United States Court of Appeals

for the Second Circuit

APPENDIX

77-7230

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7230

SEP 22 1977

WILLIAM J. SOLLOWAY,
Plaintiff-Appellant,

—against—

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,
Defendants-Appellees.

APPEAL FROM ORDER OF UNITED STATES DISTRICT COURT REFUSING PLAINTIFF'S MOTION TO REOPEN JUDGMENT

APPENDIX

WILLIAM J. SOLLOWAY
Plaintiff-Appellant, Pro Se
18 East 68th Street
New York, N. Y. 10021
212—249-2836

PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

D. C. Form No. 106 Rev.

Jury demand date:

JUDGE WARD

74 CV 3096

TITLE OF CASE

WILLIAM J. SOLLOWAY

VS

THE FIRST INDIANA CORPORATION,
CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and
CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,

ATTORNEYS

For plaintiff:

WILLIAM J. SOLLOWAY ProSe
18 East 68th St.,
New York, N.Y. 10021
Order of 5-10-77.

For defendant:
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza, NYC 10020 489 4100

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk		11/20/74	[illegible]	15 —	
			11/21/74	[illegible]		15 —
J.S. 6 mailed [illegible]	Marshal					
~~[illegible]~~						
Basis of Action: Breach of Agreement-Payment due for services rendered.	Docket fee					
	Witness fees					
Action arose at:	Depositions					

A 2

William J. Solloway vs The First Indiana Corp. etc et al

74 Civ 5096

Def't

DATE	PROCEEDINGS	Date Or Judgment
Nov 20-74	Filed Complaint & Issued Summons	
Nov 21.74	Filed Order for service by individual. Clerk	
Dec 27.74	Filed Affidavit of Personal Service by Edwin Feldman on 11/21/74.	
Dec 30.74	Filed Stip & Order that the time for defts. First Indiana Corp., Can West 1972 Gas Partnership & Can West 1973 Gas Partnership to answer is extended to 1/31/75. So Ordered Ward J.	
Feb 4.75	Filed Defts. ANSWER.	DLNI
3-14-75	[illegible] Ward	
Apr 24.75	Filed Defts'. interrogs. to Pltff.	
Apr 24.75	Filed Defts'. request for production of documents.	
Jun 19.75	Filed Pltffs. Response to request to Produce.	
Jul 3.75	Filed Defts. Answers to Interrogs.	
10-29-75	Filed Pltffs. Demand for production of documents .	
10-29-75	Filed Pltffs. Interrogs.	
10-29-75	Filed Pltffs. Answers to Interrogs.	
11-05-75	Filed Deft. First Indiana Capital Corp. Notice of Deposition of pltff. on 11-13-75.	
[illegible]	[illegible]	
1-26-76	Fld Pltff's Suppl. answer to counterclaims.	T&G
~~4-9-76~~	[illegible]	RJW
4-9-76	Fld Orders of Dismissal with prej....but w/o prej to reopen within 30 days if settlement is not consummated.... Ward,J. mn	
[illegible]	[illegible] 4-8-76	
9-1-76	Filed pltffs affdvt & notice of motion to reopen & restore case to trial calendar. ret. 9-7-76	
9-[illegible]	Fld Defts memo in opposition to pltff's motion to reopen action	
9-[illegible]	Fld defts affdvt in opposition to pltff's motion " " "	
9-13-76	Fld Pltff's reply affdvt in further support to reopen action.	
9-[illegible]	Fld pltff's memo in support to restore to calendar.	
10-14-76	Filed Memo-End. on motion dtd 9-1-76. Motion disposed of in accordance with Memo-Dec. filed herewith.....WARD,J. n/m	
10-14-76	Filed Memorandum & Order that motion is referred to Magistrate Raby to hear & recommend on the disputed facts of whether the defts made misrepresentations of their financial position, causing pltffs to rely to his detriment by agreeing to the provisions of the settlement, etc.....So Ordered, WARD,J. n/m	
12-30-76	Filed defts (Fincap) notice to admit to pltff.	
12-30-76	Filed defts supplemental interrogs to pltff.	
12-[illegible]	[illegible] BY Magistrate Raby	
2-2-77	Filed Pltff's Answers to deft's Notice to Admit.	
2-2-77	Filed Pltff's Answers to deft's Interrogs.	
3-14-77	Filed Deposition of pltff taken before Magistrate Raby dtd 2-9-77.	
3-14-77	Filed Report of Magistrate Raby, in which pltff has moved to reopen & restore case to trial calendar. For the reasons stated, it is recommended that the pltffs motion be denied in all respects. Parties are instructed that any objections hereto must be filed at Chambers of Judge Ward.....Magistrate Raby.	
#3-23-77	Filed Pltff's Notice of Objections to Report of U.S. Magistrate.	
3-30-77	Filed Deft's Memorandum in support of the United States Magistrate.	
4-4-77	Filed transcript of record of proceedings dated 4-8-77	
4-11-77	Filed Memo End. on Notice of Motion dtd 9-1-76. Mot on denied in accordance with memorandum decision filed herewith.	

Cont on page 3.

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+ civ 5096 JUDGE WARD 74 civ 5096

CIVIL DOCKET CONTINUATION SHEET PAGE #3.

PLAINTIFF	DEFENDANT	DOCKET NO ____
SOLLOWAY	THE FIRST INDIANA CORP.	PAGE __ OF ____ PAGE

DATE	NR.	PROCEEDINGS
4-11-77		Filed Memorandum that Accordingly , Pltff's objections to the report of the Magistrate afe overruled, the recommendations adopted the report confirmed. The parties are directed to consummate this long delayed settelment within thrity days of the date of this deci: . It is so ordered...Ward, J. M/N
5-9-77		Filed Pltff's Notice of Appeal to the USCA from the Order f Hon. Judge Ward, ent: 4-11-77. Mailed Copies.
5-10-77		Filed ExParte order designating the pltff. to proceed as Pro Se... WARD.J. m/n & Mailed Copy.
5-16-77		Filed Pltffs. notice of appeal to the 2nd Circuit U.S.C.A. from the order of Hon. Justice Robert J. Ward, enter in this actionon the Tenth day of May, 1977. Mailed copy, on 5-17-77.

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UNITED STATES DISTRICT COURT -
SOUTHERN DISTRICT OF NEW YORK

----------X

WILLIAM J. SOLLOWAY,

Plaintiff,

-against-

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,

Defendants.

----------X

INDEX NO.

COMPLAINT

Plaintiff, by his attorneys, Tunick & Greenburg, respectfully alleges as and for his Complaint herein:

1. (a) Plaintiff is a citizen of New York;

(b) Defendant, The First Indiana Corporation, formerly The First Indiana Capital Corporation, (hereinafter "FINCAP") is a corporation organized and existing pursuant to the laws of the State of Delaware, with its principal office located in Bloomington, Indiana.

(c) Defendant Can-West 1972 Gas Partnership (hereinafter "Can-West 1972") is a limited partnership created and existing under the laws of the State of Indiana, with its principal place of business located in Bloomington, Indiana.

(d) Defendant Can-West 1973 Gas Partnership (hereinafter "Can-West 1973") is a limited partnership created and existing under tne laws of the State of Indiana, with its principal place of business located in Bloomington, Indiana.

(e) The amount in controversy exceeds $10,000. exclusive of interest and costs.

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

2. On or about April 5, 1972, plaintiff and defendant FINCAP entered into a written Agreement, pursuant to which FINCA agreed to pay plaintiff with respect to any future transactions with Concept Resources Ltd., a Canadian oil company (a) 25% of an originating fee received by defendant FINCAP from the proceeds of "Concept" limited partnership offering, and (b) 20% of supervisory, management and/or residual fees received by defenda t FINCAP from the "Concept" limited partnership operations, and (c) the same compensation with respect to all future transactions between defendant FINCAP and "Concept", or its principal shareholder and President, Larry Darling.

3. Pursuant to said Agreement, a limited partnership, defendant Can-West 1972, was formed, and defendant FINCAP received an originating fee of $27,500., of which 25% thereof, or $6,875. was due plaintiff from defendant FINCAP, no part of which has been paid, although duly demanded, except $2,750., leaving a balance due plaintiff of $4,125.

4. Pursuant to said Agreement, a limited partnership, defendant Can-West 1973, was formed, and defendant FINCAP received an originating fee of $45,000., of which 25% thereof, or $11,250. was due plaintiff from defendant FINCAP, no part of which has bee n paid, although duly demanded.

5. Upon information and belief, pursuant to said Agreement, Rapelje Gas Partnership 1974 was or shortly will be formed, and FINCAP has received, or will receive, an originating fee of $10,000., of which 25% thereof, or $2,500. is, or will be due plaintiff from defendant FINCAP, no part of which has been paid.

6. Pursuant to said Agreement, supervisory fees in the form of cash or other participation in venture income and residuals and revenues have been, or will be, received by defendant FINCAP as a result of the transactions described in paragraphs 3, 4, and 5 above, of which 20% thereof is, or will be, due plaintiff from defendant FINCAP, no part of which has been paid by defendant FINCAP to plaintiff although duly demanded.

7. Pursuant to said Agreement, further and additional fees and income may become due and payable from Can-West 1972 and Can-West 1973 to defendant FINCAP.

8. Defendant FINCAP and defendants Can-West 1972 and Can-West 1973 have interlocking directors, officers and partners.

9. In making payments to defendant FINCAP, defendants Can-West 1972 and Can-West 1973 knew or reasonably should have known that said funds would be diverted from and not paid to, plaintiff.

10. Pursuant to said Agreement, further and additional fees and income may become due and payable from defendant FINCAP to plaintiff as a result of other transactions between defendant FINCAP and the Concept-Darling group.

SECOND CAUSE OF ACTION AGAINST DEFENDANT FINCAP

11. Plaintiff was duly elected to the Board of Directors and was elected Senior Vice President and an officer of FINCAP on or about May 16, 1972 and served in those capacities.

12. On or about May 16 and May 17, 1972, the Board of Directors of defendant FINCAP by resolution authorized the payment to plaintiff of salary in the amount of $1,000. per month and further provided that FINCAP reimburse all out-of-pocket expenses of the plaintiff.

13. Upon information and belief, said Board of Directors of defendant FINCAP did not by resolution revoke or amend said resolution until May, 1974.

14. Plaintiff has duly and faithfully performed the duties of director and officer of FINCAP.

15. By reason of the foregoing, there is presently due and owing to plaintiff from defendant FINCAP, salary in the amount of $24,000., no part of which, except $3,000., has been paid, although duly demanded, together with unreimbursed out-of-pocket

expenses in the amount of $17,028.92, no part of which has been paid although duly demanded.

THIRD CAUSE OF ACTION AGAINST DEFENDANT FINCAP

16. Pursuant to written Agreements, defendant FINCAP, on or about August 22, 1972, sold to the plaintiff 10,000 shares of its common stock at $1.00 per share. As payment for said shares, plaintiff paid defendant FINCAP the sum of $2,500., and was issued 2,500 shares, and in accordance with the sales terms executed a Promissory Note to the favor of defendant FINCAP in the amount of $7,500. for the balance, said Promissory Note to become due December 31, 1973.

17. Defendant FINCAP has issued 2,500 shares of stock to the plaintiff.

18. Prior to December 31, 1973, plaintiff and defendant FINCAP verbally agreed to issuance to plaintiff of 7,500 FINCAP shares in consideration of a $7,500. reduction of the cash debt due plaintiff from defendant FINCAP, in lieu of payment of the Promissory Note previously issued by plaintiff to defendant FINCAP.

19. On or about January 17, 1974, defendant FINCAP, by its President, wrote plaintiff:

> "Your note is being returned. FINCAP has no plans to sell you additional stock."

FOURTH CAUSE OF ACTION AGAINST DEFENDANT FINCAP

20. During and after May of 1973, defendant FINCAP ceased paying plaintiff compensation for services and reimbursement of expenses.

21. At defendant FINCAP's request, plaintiff without assistance from defendant FINCAP or its agents negotiated on behalf of defendant FINCAP, a financing program for Stanford Mines Ltd. (hereinafter "Stanford").

22. Said Stanford financing program resulted in a writing, dated May 31, 1973 between defendant FINCAP and Stanford, pursuant to which defendant FINCAP received a fee of $20,000. and a two year option to purchase 25,000 common shares of Stanford stock at $ .50 per share.

23. No compensation or other consideration has been paid by defendant FINCAP to plaintiff for rendering said valuable work and service.

24. A fair and reasonable value for such services performed by plaintiff at defendant FINCAP's behest and accepted by defendant FINCAP, which benefited therefrom, is one-half the consideration received by defendant FINCAP, specifically one-half of $20,000., or $10,000., and one-half of the option, or an option for 12,500 shares.

WHEREFORE, plaintiff demands judgment:

1. Against defendant FINCAP for known damages of $55,903.92, and for additional damages as proved, together with interest and costs.

2. Against defendants Can-West 1972 and Can-West 1973 for $15,375., and directing said defendants to pay directly to plaintiff, twenty percent of the management, residual and/or supervisory fees, whether in the form of cash, participation in venture income or residuals, which in the future may become due to defendant FINCAP, and the eighty per cent balance thereof to defendant FINCAP, together with interest and costs.

3. Against defendant FINCAP directing it forthwith to issue 7,500 of its common stock in reduction of any judgment entered herein at the rate of $1.00 per share, or if insufficient, upon payment by plaintiff of the difference at the rate of $1.00 per share.

4. Against defendant FINCAP in the amount of $10,000. and directing defendant FINCAP to assign and transfer to plaintiff half the stock options received from Stanford permitting the purchase of 25,000 shares at $ .50 per share, together with such other and further relief as to this Court may seem just and proper.

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Tunick & Greenburg
Attorneys for Plaintiff

BY: _____

Henry A. Greenburg
A Member of the Firm
Suite 5108
60 East 42nd Street
New York, N.Y.
(212) 867-7075

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

WILLIAM J. SOLLOWAY,

Plaintiff,

-against-

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,

Defendants.

74 Civ. 5096 RJW

ANSWER

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Defendants, The First Indiana Corporation (hereinafter "Fincap"), Can-West 1972 Gas Partnership (hereinafter "Can-West 1972"), and Can-West 1973 Gas Partnership (hereinafter "Can-West 1973"), by their undersigned attorneys without admitting the relevance of the various allegations to the material issues involved in this action respond to the complaint herein as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1(a). Admit the allegations of paragraphs 1(b), 1(c) and 1(d). Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1(e) with respect to defendant Fincap. Deny the allegations of paragraph 1(e) with respect to defendants Can-West 1972 and Can-West 1973. Further aver that with the possible exception of plaintiff no employees or officers of Fincap or the other defendants either resided or maintained an office in New York during their employment with defendants in the time period covered by plaintiff's allegations.

2. Admit so much of paragraph 2 as alleges that Fincap and Solloway on or about April 5, 1972 entered into a written Agreement (hereinafter "April 5, 1972 Agreement"). Aver that pursuant to the April 5, 1972 Agreement Fincap agreed to pay Solloway certain monies with respect to some specified transaction between Fincap and Concept Resources, Ltd. Deny the remainder of paragraph 2 including the incomplete and therefore inaccurate allegations of the April 5, 1972 Agreement terms.

3. Admit so much of paragraph 3 as alleges that Can-West 1972 was formed but deny the remainder of paragraph 3. Aver that defendant Fincap received an originating fee of $11,000 from the formation of Can-West 1972, one fourth of which ($2750) was duly paid to plaintiff. Further aver that plaintiff accepted this fee and subsequently reaffirmed that this amount was the total portion of originating fee due plaintiff from the formation of Can-West 1972 under the terms of the April 5, 1972 Agreement.

4. Admit so much of paragraph 4 as alleges that Can-West 1973 was formed but deny the remainder of paragraph 4. Aver that defendant Fincap received an originating fee of $11,250.00 as a result of the formation of Can-West 1973, of which one fourth, $2812.50, was tendered to plaintiff.

5. Deny each and every allegation of paragraph 5.

6. Deny each and every allegation of paragraph 6. Aver that supervisory fees are due to Fincap as a result of the Can-West 1972 transaction beginning in or about January, 1975. Supervisory fees are due to Fincap as a result of the Can-West 1973 transaction beginning in or about March, 1975. Further aver that the April 5, 1972 Agreement between Fincap and Sollow y contains the following provisions:

"2. Solloway shall receive one percent (1%) of the five percent (5%) (20% of the) supervisory fee received by Fincap, which fee shall be five percent (5%) of the limited partnership's gross income. This fee shall be paid for as long as the fee is paid to FinCap [illegible] after the three-year period, and from the fourth year to the termination of the partnership, Solloway upon request of FinCap to render shall render consulting services in the administration of this partnership, failing same, no fee shall be paid.

3. Should FinCap and Concept, or its successor companies or associate companies wherein Mr. Larry Darling is a principal shareholder (directly or indirectly), enter into a subsequent financing agreement whereby FinCap renders financial services, the same commission percentages as herein set out shall apply and be paid to Solloway; . . ."

7. Deny each and every allegation of paragraph 7.

8. Deny each and every allegation of paragraph 8. Aver that Fincap is a general partner of Can-West 1972 and Can-West 1973 and that Fincap's President, Dr. Haeberle, is a general partner of Can-West 1972. Some limited partners of Can-West 1972 and Can-West 1973 are shareholders of Fincap.

9. Deny each and every allegation of paragraph 9.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10.

11. Admit that plaintiff has served as a director, as Senior Vice President and as Assistant Secretary of Fincap and admit that plaintiff was elected to those positions on or about May 16, 1972 at a meeting of the Fincap Board which meeting was held without a quorum but was subsequently ratified by the directors.

12. Deny each and every allegation of paragraph 12. Aver that at a meeting of Fincap directors held without a quorum on or about May 16 and 17, 1972 the directors present voted interim salaries of one thousand dollars a month to plaintiff after, in the opinion of the directors, Fincap was adequately financed and also voted to reimburse out-of-pocket expenses of directors and officers. Plaintiff has been repeatedly informed by Fincap's President that no salaries were approved for either plaintiff or Fincap's President until Fincap's financial position improved. The fact that Fincap's senior officers were serving without pay was stated in Fincap's audited financial statements which were or should have been read and approved by plaintiff in his capacity as director and officer of Fincap.

13. Deny each and every allegation of paragraph 13. Aver that after May 9, 1974 plaintiff was no longer a director or an officer of Fincap. Further aver that expenses claimed by plaintiff to be properly allowable expenses were fully paid through August 4, 1973. Since that date plaintiff has been repeatedly informed in writing by Fincap's President that his expenses must be directly related to specified Fincap projects and properly documented. Plaintiff has not complied with this directive.

14. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14.

15. Deny each and every allegation of paragraph 15. Aver that Fincap has paid plaintiff the sum of at least three thousand dollars ($3000) for expenses.

16. Deny each and every allegation of paragraph 16.

17. Admit the allegations of paragraph 17.

18. Deny each and every allegation of paragraph 18. Aver that at a meeting of Fincap directors on August 29 and 30, 1972 the Board agreed that all operating management (including plaintiff) should sign a Management Contract and that any stock sold to plaintiff would be sold subject to the Management Contract. A copy of the contemplated Management Contract form was sent to directors before the meeting, discussed at the meeting and attached to the minutes of the meeting. Plaintiff participated in this Board meeting as a Director and was therein elected Secretary to the Board. Plaintiff subsequently signed the minutes of the Board meeting. Plaintiff later refused to sign the Management Contract and upon information and belief has never signed it. Fincap's other operating management did sign the Management Contract. The Management Contract form included a promise by Fincap to sell Fincap stock to the signing party according to certain terms that were approved by the Fincap Board at the August 29 and 30, 1972 Board meeting.

19. Admit the allegations of paragraph 19 except aver that the letter referred to was dated January 29, 1974.

20. Deny each and every allegation of paragraph 20.

21. Deny each and every allegation of paragraph 21. Aver that plaintiff participated in locating Stanford Mines, Ltd. as a potential client for Fincap. Aver that Fincap employees other than plaintiff performed services for Stanford mines including the preparation of business documents.

22. Admit the allegations of paragraph 22. Aver that Fincap's fee and other consideration received from Stanford Mines, Ltd. were principally in consideration of the preparation of documents and other services performed by Fincap employees other than plaintiff.

23. On information and belief admit the allegations of paragraph 23. Aver that Fincap did not specially compensate its other officers and directors for performing similar services.

24. Deny each and every allegation of paragraph 24.

First Affirmative Defense

This action is barred in whole or in part by the applicable statute of limitations.

Second Affirmative Defense

Defendants Fincap, Can-West 1972 and Can-West 1973 are not subject to the jurisdiction of this court. They are neither doing business within the State of New York nor are they otherwise present in this jurisdiction.

Third Affirmative Defense

Defendant Can-West 1973 has not been properly served with process in this matter. Dr. Haeberle who has been served with process is not a partner of Can-West 1973.

Can West 1973

Fourth Affirmative Defense

The amount in controversy with respect to defendants Can-West 1972 and Can-West 1973 is less than ten thousand dollars exclusive of interest and costs.

Fifth Affirmative Defense

Plaintiff is estopped from claiming a front end finder's fee in excess of $2812.50 as a result of the formation of Can-We t 1973. Plaintiff assented to Dr. Haeberle's explanation of the operation of the April 5, 1972 Agreement in the Can-West 1973 transaction before the closing of the Can-West 1973 transaction.

Fincap's directors relied on plaintiff's assent when they authorized the closing of Can-West 1973.

WHEREFORE, defendants demand judgment dismissing the complaint with costs to defendant, together with such other and further relief as to the court may seem just and proper.

Dated: New York, New York
January 31, 1975

DONOVAN LEISURE NEWTON & IRVINE

By _____
A Member of the Firm

30 Rockefeller Plaza
New York, New York 10020
212-489-4100

Attorneys for Defendants
The First Indiana Corporation
Can-West 1972 Gas Partnership
Can-West 1973 Gas Partnership

RAYMOND F. BURGHARDT, CLERK

By [illegible]

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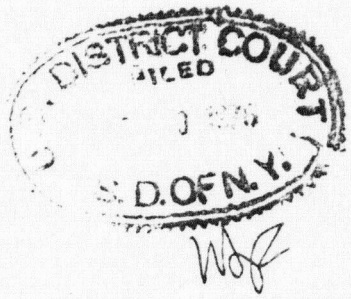

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No.
74 Civ 5096

[illegible]

ORDER OF DISMISSAL

The Court having been advised by the counsel for the parties that the above action has been settled;

IT IS ORDERED that this action is hereby dismissed with prejudice and without costs ~~but without prejudice to the right, upon good cause shown within 30 days~~, to reopen the action if settlement is not consummated.

Dated: New York, N.Y.
April 5, 1976

Robert J. Ward

4-8-76 PRE-TRIAL CONFERENCE HELD BY Ward.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

WILLIAM J. SOLLOWAY, :

Plaintiff :

vs. :

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership, : 74 CIV. 5096

Defendants. :

----------X

Before:

HON. ROBERT J. WARD (District Judge)

New York, New York
April 8, 1976
4:00 o'clock p.m.

APPEARANCES

TUNICK & GREENBURG, ESQS.
Attorneys for the Plaintiff
BY: CARL TUNICK, ESQ.
HENRY A. GREENBURG, ESQ.

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.
Attorneys for the Defendants
BY: JOHN LINVILLE, ESQ.

MR. TUNICK: It is hereby stipulated and agreed by and between the attorneys for the respective parties, with the appearances of the plaintiff in person, Mr. William J. Solloway, and the defendants by the corporate officer and partner, Dr. William Haeberle, that the within matter be settled upon the following terms and conditions:

One, the defendant agrees to pay the sum of $30,000 to plaintiff by payment of $5,000 on or before May 10, 1976, the balance of $25,000 together with interest at the rete of 6 percent per annum in ten semi-annual installments with the first installment to be paid on the first business day of January 1977 and the remaining installments to be paid on the first business day of each succeeding July and January with the final payment to be made on the first business day of July 1981. At the time of each installment payment of principle there shall be a simultaneous payment of interest on the unpaid balance then outstanding at the above rate of interest.

Two, the parties have agreed that all recurring fees referred to in the written agreement of April 5, 1972 and fixed in that contract at 20 percent shall be now deemed to be 8 percent including payments to FINCAP from future transactions between FINCAP and Concept.

Three, upon completion of the payment of the

$25,000 plus interest referred to in paragraph one plaintiff shall deliver 2500 shares of FINCAP to the defendant.

Four, the parties have agreed to arrive at a security instrument which will provide security for the plaintiff for the payments referred to herein to the extent possible by the defendant.

Five, in the event of a disagreement with respect to that security the parties shall have 30 days within which to put the case back on the calendar and try it.

Six, in the event of a default in the making of any payment required to be made hereunder after written notice by certified mail to the defendant, FINCAP, and such default continuing for ten days thereafter then, in that event, the plaintiff shall have the right to enter judgment with the clerk without further notice for the balance due under this stipulation.

Seven, in working out the security arrangement referred to above the defendants have agreed to furnish financial statements of the three defendants which while unaudited shall not be older than six months. And that such statements will be furnished within two weeks from the date hereof; and which financial statements shall contain the statement that they are true and correct on the basis of whatever knowledge Dr. Haeberle has.

Eight, upon the payment of the initial $5,000 the parties shall execute general releases excepting from those releases the obligations under this stipulation and the releases shall be held in escrow by the defendant's counsel, Messrs. Donovan, Leisure, Newton & Irvine, until the payment of $30,000 shall have been completed at which time they may be delivered to the respective parties.

THE COURT: Mr. Linville, you have heard the stipulation dictated into the record by Mr. Tunick. Do you agree to this settlement on behalf of the defendants?

MR. LINVILLE: Yes, Your Honor.

THE COURT: I note that the principles are here in court, the plaintiff, William J. Solloway, and the defendant's principle officer, Dr. Haeberle.

I am going to ask each of them if they agree to the settlement. Mr. Solloway, I understand you are an attorney admitted to practice in Canada. I would first ask you if you agree to the settlement which has been set forth by counsel?

MR. SOLLOWAY: Yes, I do. I agree to the settlement.

THE COURT: Dr. Haeberle, I understand that you are the chief officer of the defendant corporations, is that correct?

DR. HAEBERLE: Yes, Your Honor.

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THE COURT: Are you authorized to agree to a settlement on behalf of the defendants?

DR. HAEBERLE: Yes, Your Honor.

THE COURT: Do you agree to the settlement which has been set forth by counsel today?

DR. HAEBERLE: Yes, Your Honor.

THE COURT: And you do that on behalf of the defendants, is that correct?

DR. HAEBERLE: Yes, Your Honor.

THE COURT: The court approves the settlement and I will sign an order of dismissal which reads as follows: "The court having been advised by counsel for the parties that the above action, that is this action, has been settled it is ordered that this aciton is hereby dismissed with prejudice and without costs but without prejudice to the right upon good cause shown within 30 days to reopen the action if settlement is not consummated." The order is dated New York, New York, April 8, 1976. I shall now sign the order of dismissal.

I have signed the order of dismissal. Thank you, gentlemen.

o O o

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM J. SOLLOWAY :

Plaintiff :

-against- :

THE FIRST INDIANA CORPORATION, :
CAN-WEST 1972 GAS PARTNERSHIP, :
a limited partnership, and :
CAN-WEST 1973 GAS PARTNERSHIP, :
a limited partnership :

Defendants :

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74 CIV. 5096 RJW

NOTICE OF MOTION AND MOTION TO REOPEN AND RESTORE CASE TO THE TRIAL CALENDAR

TO: Donovan, Leisure, Newton & Irvine, Esqs.
Attention: John Linville, Esq.

Please take notice that on September 7, 1976, at 2:30 PM, or as soon thereafter as counsel can be heard, WILLIAM J. SOLLOWAY, Plaintiff, will move the Court, at the Chambers of Honorable Robert J. Ward, United States District Court Judge, at the United States Courthouse, Foley Square, New York, New York, as follows:

1. To reopen the settlement of this case by authority of the provision contained in Judge Ward's Order, dated April 8, 1976, and to restore this case to the Trial Calendar.

This motion is based on this Notice, the pleadings, records and files herein; on the affidavit of WILLIAM J. SOLLOWAY, attached as Exhibit A.

Dated: New York, New York
August 27, 1976

JAMES O'HARE

TUNICK & GREENBURG
60 East 42nd Street
New York, New York 10017
212/867-7075

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. SOLLOWAY :

Plaintiff :

-against- :

AFFIDAVIT

THE FIRST INDIANA CORPORATION, :
CAN-WEST 1972 GAS PARTNERSHIP,
a limited partnership, and :
CAN-WEST 1973 GAS PARTNERSHIP,
a limited partnership :

Defendants :

WILLIAM J. SOLLOWAY, being duly sworn, deposes and says:

I am Plaintiff in this action, and I make this Affidavit in support of my Motion to reopen the settlement of this case, by virtue of the "reopening provision" contained in the Order of Judge Ward, dated April 8, 1976, which provision has subsequently extended to September 7, 1976.

I was advised that the matter could be placed back on the calendar if:

1. satisfactory security arrangements could not be made to insure performance of the settlement, or

2. if the current financial statements, when they became available (they were <u>not</u> available at that time),

did not verify the representations made by the defendants at the conference, or

3. if the information ordered from the defendant was not forthcoming.

In fact, the information ordered has only been partially produced.

Furthermore, Mr. Haeberle, President of Fincap, and his attorneys, made representations that Fincap and its managed 1972 and 1973 limited partnerships were a failure, and totally illiquid, if not insolvent.

On the basis of such verbal representations, I made a settlement which resulted in:

(A) Reimbursement to me of approximately $30,000 of monies I had expended largely for out-of-pocket travel expenses on behalf of Fincap.

(B) The surrender by me of 2500 shares of stock (5% of the defendant corporation) for which I had paid $1.00 per share.

(C) The surrender by me of an option to purchase another 7500 shares, based solely on the representation of the defendant as to what Judge Ward had told him and had not discussed with me or my attorney.

(D) The waiver by me of my claim for two (2) years back salary.

(E) The waiver and reduction by me of other claims against defendants.

Since then, I have not received all the information required. I have received partial financial information and gas production valuations for the past two years.

Even though incomplete, such information proves that I was grossly misled in the settlement negotiations by the defendants.

The absence of total financial information has left me in a position of being unable to fashion a secure agreement, even if the settlement had remained reasonable and satisfactory.

While I, like any litigant, would much rather settle this case, I must regretfully conclude that it is most improbably that a fair and equitable settlement can be arrived at in this case and that we must look to a judicial determination of all respective rights.

I, therefore, must respectfully request the Court to restore this matter to the Trial Calendar.

William J. Solloway

WILLIAM J. SOLLOWAY

Sworn to before me this
28th day of August, 1976.

[illegible]

[illegible] York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

WILLIAM J. SOLLOWAY, :

Plaintiff, :

-against- : 74 Civ. 5096 RJW

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership, : AFFIDAVIT

Defendants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN E. LINVILLE, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and am an associate with the firm of Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza, New York, New York 10020, attorneys herein for the defendants. I make this affidavit in opposition to plaintiff's motion to reopen this case and restore it to this Court's trial calendar.

2. I was present in this Court before the Honorable Robert J. Ward on April 8, 1976 during negotiations in this matter. During these negotiations an agreement settling this case was reached and read into the record of proceedings before Judge Ward at 4:00 P. M. (hereinafter this agreement is referred to as the "Settlement Agreement"). A copy of the transcript embodying this agreement is annexed hereto for the Court's convenience as Exhibit A.

3. Dr. Haeberle, the President and Chairman of the Board of the First Indiana Capital Corp. ("Fincap") was also present at these April 8, 1976 negotiations as was Mr. Solloway, the plaintiff. During these negotiations neither Dr. Haeberle nor I "made representations that Fincap and its managed 1972 and 1973 limited partnerships were a failure, and totally illiquid, if not insolvent." Dr. Haeberle did say that it was his understanding Fincap's most recent financial statements would show that the company did not have a strong current cash position and would therefore prefer to stretch out any settlement payments over a period of years. Moreover, Dr. Haeberle suggested that the principal value of Fincap at the present time was derived from its entitlement to future payouts from various tax shelter transactions based primarily on oil and gas ventures. The indefinite and indeterminate nature of these interests make any quantitative assessment of their value speculative.

4. During the Settlement Agreement negotiations there was never any suggestion made to plaintiff by either myself or Dr. Haeberle that the Settlement Agreement was contingent upon any statement by Dr. Haeberle concerning Fincap's finances.

5. In fact, I am informed by Dr. Haeberle that the audited Fincap financial statements for the year ending January 31, 1976 do verify with remarkable accuracy any statement he can recall making to Mr. Solloway in the April 8, 1976 settlement negotiations. For the Court's information we are attaching the latest Fincap audited financials as Exhibit B hereto. These are similar to the unaudited figures given to the plaintiff before the audited figures became available this week.

6. I am informed by Dr. Haeberle that Fincap in reliance upon its Settlement Agreement with the plaintiff has taken steps to rearrange its finances so as to enable it to make its settlement payments to the plaintiff. In the event that the Settlement Agreement is abrogated Fincap will have been damaged by these good faith attempts to comply with its settlement obligations.

John Linville

Sworn to before me this
3rd day of September, 1976.

Michael R. Dacey

MICHAEL R. DACEY
NOTARY PUBLIC, State of New York
No. 31-4501068
Qualified in New York County
Commission Expires March 30, 1978

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM J. SOLLOWAY :

Plaintiff :

-against- :

THE FIRST INDIANA CORPORATION, :
CAN-WEST 1972 GAS PARTNERSHIP,
a limited partnership, and :
CAN-WEST 1973 GAS PARTNERSHIP,
a limited partnership :

Defendants :

----------x

74 Civ. 5096 RJW

REPLY AFFIDAVIT

WILLIAM J. SOLLOWAY, being duly sworn, deposes and says:

I respectfully submit this affidavit in Reply to the affidavit of JOHN LINVILLE, ESQ., sworn to September 3, 1976.

Defendant, in the interests of good faith and full disclosure, was required to produce complete financial information as follows:

(1) "Schedule A" to the Comparative Balance Sheet dated January 31, 1976, which was omitted from the financials submitted after the proposed settlement (which financials were unavailable in Court) and which Schedule A contained the current value of the partnership (and Fincap's) interest and future cash flow.

(2) Minutes of Director's meetings.

(3) More than 34 memos to the Investors in order to determine

(a) whether a five (5) year payout is reasonable and would result in the payment of the settlement,

(b) the value of the shares of Fincap as represented in Court,

(c) what the present and future unearned cash flow is from the Plaintiff's originated Can West Partnerships. , The withholding of these documents negates the disclosure request by the Court as Fincap, as a financial service company, is not a "balance sheet" company. Rather, its financial footnotes reflect its real value because of the accounting systems used. The defendant has issued two different financial statements dated January 31, 1976, and the footnotes are vastly different in the two documents. The financials given out by the defendant in May, which did not include Schedule A (and therefore omitted Fincap's future cash flow) contain vastly different footnotes than financials dated January 31, 1976, and marked Exhibit B which were only read by the plaintiff on September 9, 1976. The "new" footnotes vastly change the pro forma net worth of the company, its prospects and its ability to pay off its obligations.

It is to be remembered that the most recent financials that Fincap produced during the negotiations in Judge Ward's Court were 27 months old and that now that a settlement has erroneously been arrived at based on out-dated evidence, the new financials in great detail forecast $818,000, in unearned income by 1980. Notwithstanding this projection, the defendant has not submitted a cashflow for 1976, 1977, 1978, 1979 and 1980, which are the years over which the settlement to the Plaintiff are to be made and would show what the Plaintiff's originated gas partnerships would yield to Fincap. These financial omissions and previous footnote misinformation has characterized the defendants' representations and lack of good faith.

In Mr. Linville's affidavit, dated September 3, 1976, he errs in Paragraphs 3, 4, 5. In Paragraph 5, Mr. Linville has sworn that he has been informed by Dr. Haeberle that the unaudited financials (of May, 1976) are similar to the financials marked Exhibit B, and his letter dated September 7, 1976, to Judge Ward points out small changes under miscellaneous expenses. However, he omits to point out to the Court, the extra full page of footnotes to the financials and the fact that the defendant now discloses a future cashflow of $818,000, the issuance of 8,000 shares of stock to certain directors, and Dr. Haeberle, and the raising of $15,000 in debt. These footnotes are

important material disclosures having great bearings on Fincap's net worth and the settlement at issue and must be brought to the Court's attention. (see Note 1 (b) (c); 2 (a); 3 (a) stating that Fincap's management believes that Can West 72 will earn it $502,577, of which 20% of this will come between 1976-80; and 3(c) states that Can West 73 will earn Fincap $243,512, of which 70% ($170,000) will come between 1976-80.)

Therefore, the defendant by claiming not to have any financials since January 31, 1974, misrepresented their present and future prospects and cashflow to the plaintiff and the Court in the amount of at least $818,000., which resulted in a totally inequitable settlement and are in conflict with the defendant's statements before Mr. Justice Ward that the defendant (a) requires 5 years to pay a settlement of $30,000 (b) would go into bankruptcy should it lose this action (c) that its shares are of little or no value (instead of a cashflow of $15.75 per share).

This is particularly injust in view of the fact that the settlement involved the surrender by plaintiff of 2500 shares, and an option for an additional 7500 shares of

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Fincap stock.

Dated: New York, New York
September 10, 1976

William J. Solloway
WILLIAM J. SOLLOWAY

Sworn to before me this
10th day of September, 1976.

[illegible]

JAMES [illegible] HARE
[illegible] York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM J. SOLLOWAY,

Plaintiff,

74 Civ. 5096
R.J.W.

-against-

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,

Defendants.

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Plaintiff, William J. Solloway ("Solloway"), moves to reopen and restore this case to the trial calendar by virtue of a "reopening provision" in the order of dismissal dated April 8, 1976 and, alternatively, under Rule 60(b), Fed. R. Civ. P.[1] Solloway claims that he was misled into settling this dispute in reliance upon alleged factual misrepresentations of the financial condition of defendants, The First Indiana Corporation ("Fincap"), Can-West 1972 Gas Partnership, and Can-West 1973 Gas Partnership, made to him by Dr. William L. Haeberle, President and Chairman of the Board of Fincap. Furthermore, plaintiff claims that incomplete financial disclosure by Fincap has prevented him from fashioning a satisfactory security arrangement in accordance with the settlement

provisions. For the reasons hereinafter stated, the motion is referred to a magistrate to hear and recommend on the disputed factual issues: (1) Did the defendants make misrepresentations of their financial position, causing plaintiff to rely thereon, to his detriment, by agreeing to the provisions of the settlement? (2) Have the parties made a good faith effort to arrive at a satisfactory security arrangement?

This action, commenced in December of 1974, arose out of a business association between the parties. Plaintiff, who had served as director, senior vice president and assistant secretary of Fincap for a period of two years between May 1972 and May 1974, brought suit on various contractual claims. After a period of extensive pretrial discovery and out-of-court negotiations, the parties agreed to a settlement on April 8, 1976.

According to the terms of the agreement, Solloway was to receive the sum of $30,000 over a period of five years and upon payment, would surrender his shares of Fincap to the defendants. Provision was also made for an instrument which would provide security for plaintiff for the above payments "to the extent possible by the defendant." To this end, defendants were to furnish recent, unaudited financial statements to plaintiff. In the event of a disagreement with respect to the security, the parties had 30 days within which to

reopen the action. The action was thereupon "dismissed with prejudice and without costs but without prejudice to the right, upon good cause shown within 30 days, to reopen the action if settlement [was] not consummated." Solloway, thereafter, received four extensions of 30 days each within which to resolve the matter and on September 7, 1976, moved the Court to reopen the action.

Plaintiff now claims that the financial statements which Fincap produced during negotiations were out-dated and did not reveal the true state of defendants' enterprises. Furthermore, Solloway states that "Mr. Haeberle, President of Fincap, and his attorneys, made representations that Fincap and its managed 1972 and 1973 limited partnerships were a failure, and totally illiquid, if not insolvent." According to Solloway, the settlement agreement was contingent upon the validity of defendants' representations and is no longer binding in light of subsequently discovered, contradictory information which indicates a considerably brighter outlook for Fincap than had previously been revealed to plaintiff.

Defendants and their attorneys, on the other hand, deny making any representations to plaintiff concerning their near insolvency or the contingent nature of the settlement, admitting only that Dr. Haeberle had suggested that Fincap's most recent financial statement prior to the settlement "would show that the company did not have a strong current

cash position" and that the future of the enterprise was speculative.

As a general rule, the law encourages the compromise and settlement of disputes. Williams v. First National Bank, 216 U.S. 582 (1910); Newman v. Stein, 464 F.2d 6[illegible] (2d Cir.), cert. denied, 409 U.S. 1039 (1972); Tulsa City Lines, Inc. v. Mains, 107 F.2d 377 (10th Cir. 1939). A party who is represented by counsel and makes an informed decision to accept the terms of a settlement is ordinarily bound by it, even though it is subsequently discovered to have been ill-advised. See Morse Boulger Destructor Co. v. Camden Fibre Mills, Inc., 239 F.2d 382 (3d Cir. 1956); Robinson v. E.P. Dutton & Co., 45 FRD 360 (S.D.N.Y. 1968); cf. Sampson v. Radio Corp. of America, 434 F.2d 315 (2d Cir. 1970); Dal Int'l Trading Co. v. Sword Line, Inc., 286 F.2d 523 (2d Cir. 1961). However, the facts of a particular case may warrant relief under Rule 60(b), Fed. R. Civ. P., or under a reopening provision in a settlement agreement.

"One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." Callen v. Pennsylvania R.R. Co., 332 U.S. 625, 630 (1948); Parker v. Checker Taxi Co., 238 F.2d 241 (7th Cir. 1956), cert. denied, 353 U.S. 922 (1957).

In order to vacate a settlement, the fraud or misrepresentation must be demonstrated by clear and convincing evidence. See Mastini v. American Telephone & Telegraph Co., 369 F.2d 378 (2d Cir. 1966), cert. denied, 387 U.S. 933 (1967); DiVito v. Fidelity & Deposit Co., 361 F.2d 936 (7th Cir. 1966); Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F.2d 114 (2d Cir. 1962). Therefore, Solloway, who has the burden of proving the existence of the alleged misrepresentations, must also show that he had the right to rely upon those statements without any further investigation of defendants' current financial status. McCarthy v. Cahill, 249 F. Supp. 194 (D.D.C. 1966). If plaintiff can not demonstrate the truth of his allegations as to fraud or mistake, the settlement must be enforced in the absence of any other "good cause" to reopen the action.

Solloway further contends that he has been unable to arrange for security as contemplated by the settlement agreement because defendants furnished him with incomplete data. The provisions of the settlement which relate to security are as follows:

> Four, the parties have agreed to arrive at a security instrument which will provide security for the plaintiff for the payments referred to herein to the extent possible by the defendant.
>
> Five, in the event of a disagreement with respect to that security the parties shall have 30 days within which to put the case back on the calendar and try it.

* * *

> Seven, in working out the security arrangement referred to above the defendants have agreed to furnish financial statements of the three defendants which while unaudited shall not be older than six months. And that such statements will be furnished within two weeks from the date hereof; and which financial statements shall contain the statement that they are true and correct on the basis of whatever knowledge Dr. Haeberle has.

In May of 1976, defendants provided plaintiff with an unaudited financial statement dated January 31, 1976, ostensibly meeting the requirements of the accord. Solloway has not indicated what good faith efforts he has made in attempting to arrange for security and can not now unilaterally repudiate the settlement because he is no longer satisfied with the agreement.

> Where the agreement is made, as here, under the eyes of the court, it is a most solemn undertaking, requiring the lawyers, as officers of the court, to make every reasonable effort to carry it through to a successful conclusion.

Warner v. Rossignol, 513 F.2d 678, 682 (1st Cir. 1975). Unless plaintiff can show that he has made good faith attempts to arrive at a security agreement, he will not have satisfied the "good cause" requirement in the reopening provision of the settlement on this ground.

Accordingly, the motion is referred to Magistrate Harold J. Raby to hear and recommend on the disputed facts of whether the defendants made misrepresentations of their financial

position, causing plaintiff to rely thereupon, to his detriment, by agreeing to the provisions of the settlement and whether the parties have made a good faith effort to arrive at a satisfactory security arrangement.

It is so ordered.

Dated: October 14, 1976

Robert L. Ward
U. S. D. J.

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NOTE

1 Rule 60(b), Fed. R. Civ. P., provides in pertinent part:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

If it couldn't be done within that period, then within that period one side could make a motion to restore.

MAGISTRATE RABY: To restore, so it remained sort of hanging in midair, with a number of extensions for a number of months.

MR. TUNICK: Right, your honor.

MR. LINVILLE: Well, the period ran for a number of additional months in which we were trying to work out this security agreement.

MAGISTRATE RABY: Well, did the time ever expire?

MR. TUNICK: No.

MR. LINVILLE: The present motion was made within the expiration of the last extension.

MR. TUNICK: I think a shorter answer to that question, your honor, is, no.

Q Is it your position, Mr. Solloway, that you could not work out a reasonable security arrangement for yourself with the kind of financials that you had available to you within the period?

A That's correct. Without the schedule A which reflects what FINCAP was worth and what the partnerships are doing, there is no security. FINCAP, according to

these financials, is a nonactive company that a cash flow of about 30 or 40,000 a year and they spend it with traveling expenses and they rent Dr. Haeberle's garage to carry on the business.

Q Is it your testimony that you weren't aware of the specific assets in the absence of proper financials to know what it is that you could get a security interest in?

A That's right.

Q Whether one or two or three or four of them would be required to secure as opposed to one?

A That's right.

MR. TUNICK: Your honor, may we have just one moment?

(Discussion off the record.)

Q Mr. Solloway, I have cut you short on a number of occasions.

Is there anything you want to add to our presentation before I conclude your examination?

A After demanding the documents and after receiving the memos to the partnerships and also the certified financials which I received on the 9th day of September, there is a vastly different image of this company.

The certified financials state, and they state it

I might add in a strange form, but once again in their footnotes they state that based on the engineering reports which we had requested and is on the exhibit here, FINCAP's share of the 1972 Gas Partnership is $502,000.00. That is one partnership. One of six partners. That they are a general partner of, C, the company is to receive in '73 Gas Partnership $243,000.00.

Now this is the same company that was going into bankruptcy if they pay us. These are so stated in a form that says things like this which I find confusing.

It says that:

"FINCAP will receive $502,577.00, twenty percent of this will be received within the first five years, 1976-1980."

I think that's a very strange statement for a financial report. It should show so much per year or projected so much per year, not a grouping of that nature.

The financials make a similar reference to another partnership and they said seventy percent of this will be received within the first five years.

These are not the kind of financial information that is available, that is available by the engineering report.

Q Mr. Solloway --

A That was supplied as a memorandum from the general partner which was FINCAP to the limited partners in the partnership.

There were some seventy memorandums sent to the limited partners which contained this information and which I was never privy to and Dr. Haeberle had written these memos and knew every aspect of the values inherent in this company.

Q Mr. Solloway --

A At the time.

Q In connection with the settlement, did you also relinquish as part of the settlement a disputed claim for the exercise of an option of shares in the company?

A Yes.

Q How many shares were involved there?

A 7,500 shares which represents approximately fourteen percent of the company.

Q So that with the shares that you owned no matter what happened in the lawsuit win, lose or draw, 2,500 shares and the 7,500 shares, if you would prevail on your option, would have amounted to about twenty percent of the shares of the company?

A Yes.

I think the other side should make some efforts to refute it.

MAGISTRATE RABY: All right. Thank you, sir.

Gentlemen, there are two aspects in this case.

The motion seems to have two prongs.

The first prong of the motion seeks to unsettle a settlement on the grounds of fraud and inducement.

Second prong of the motion seeks to unsettle the settlement on the grounds that even assuming that there was no fraud in the inducement, nevertheless, there was a failure on the part of the defendants to comply with a condition subsequent to the settlement, namely the supplying of adequate information upon which to frame an adequate security agreement.

I will consider the second prong of the motion first, because it is independent and of -- unrelated to the first prong of the motion.

To the extent that it is charged that the defendants failed to supply necessary financial information to form a basis for the preparation of an adequate security agreement, the testimony of

the plaintiff in this case is that although there was an initial noncompliance with his requests for necessary financial information there came a time ultimately when the necessary financial information was supplied, so that if so advised, the plaintiff could then have prepared an adequate security agreement, if he was in mind to do so.

Evidently he is not of a mind to do so, number one, because the time stipulated for compliance has expired and number two, because in any event the plaintiff having received the financial information feels that he was defrauded and, therefore, does not see fit to go through with this transaction and, therefore, has refrained from preparing the security agreement.

Now, if there was no fraud in this case, if there was no reliance upon representations by the plaintiff, then I am constrained to hold and to find that the mere fact that the defendant was late in supplying the information needed to supply a financial statement would be no justification for the opening up of the settlement in this case.

After all, the granting of relief under 60B is within the discretion of the court.

And I think that in view of the fact that the defendants have albeit belatedly supplied the necessary raw material or input, as it were, for the preparation of a security agreement, disposes of that basis for the motion unless, as I say, the motion can be justified on the independent grounds of fraud.

Now, I submit in that connection that there can be no fraud, no misrepresentation effectively unless there is reliance.

The testimony of this plaintiff was that he disbelieved and distrusted his opponents.

That being the case, one wonders why the plaintiff did not insist as it was his undoubted right to do upon deferring the settlement of this case until he had in hand the financial information which would state in writing what the then financial position of this plaintiff was.

He was not unaided by counsel. With the assistance of counsel and with the concurrence of counsel he agreed to a settlement without any prior condition, without any recital that this settlement is subject to the receipt of financial information.

With respect to the question of whether or

not the financial information was accurate, the only reference to the financial statement was in the context of enabling the plaintiff to prepare an adequate security arrangement.

In short, I find that the testimony of the plaintiff belies any viable claim on his part that he was led down the primrose path. He has stated that he didn't believe the representations made by the defendants as to their financial embarrassment.

Under those circumstances, I am led to the necessary inference that he did what he did with his eyes wide opened and that under the circumstances he should not be able, not be permitted to unsettle this judgment.

Those are my views and these views will constitute my report and recommendation to Judge Ward and I direct that upon the delivery to me of the transcript of this proceeding, which I will file immediately with Judge Ward, any objections to this report and recommendation must be filed with Judge Ward within ten days from the date of my receipt of said transcript unless the time to do so is extended by Judge Ward.

This hearing is now closed.

_____

Subscribed and sworn to before me

this ____ day of _____ 1977.

_____

I N D E X

Witness	Mr. Tunick	Mr. Linville
William J. Solloway	6 62	48

E X H I B I T S

Plaintiff's	Description	For Id.	In Evid.
1	Book.	26	30
2	Book.	31	32
3	Consolidated balance sheet of The First Indiana Corporation.	39	42

* * *

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MAR 1 1 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

WILLIAM J. SOLLOWAY,

Plaintiff,

-v-

74 Civ. 5096 (RJW)

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,

REPORT OF UNITED STATES MAGISTRATE

Defendants.

- -x

TO THE HON. ROBERT J. WARD, UNITED STATES DISTRICT JUDGE:

The plaintiff in this case has moved to reopen and restore this case to the trial calendar notwithstanding the prior filing of an Order of Dismissal under date of April 8, 1976 based upon an assumed settlement of the case at that time.

By Memorandum and Order dated October 14, 1976, you referred that motion to me as a Magistrate of this Court "to hear and recommend on the disputed facts of whether the defendants made misrepresentations of their financial position, causing plaintiff to rely thereupon, to his detriment, by agreeing to the provisions of the settlement and whether the parties have made a good faith effort to arrive at a satisfactory security arrangement."

In pursuance of that reference, I conducted a hearing and took testimony on February 9, 1977. The transcript of that testimony is forwarded herewith.*

My findings and conclusions were rendered on the record at the conclusion of that hearing and are found at pages 69 through 73 of the transcript.

For the reasons therein stated, it is respectfully recommended that the plaintiff's motion be denied in all

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*Please note that the transcript has not yet been filed in Court or docketed by the Clerk.

respects.

Copies of this Report have been mailed this date to counsel for the interested parties who are instructed that any objections hereto must be filed at your Chambers within ten days.

Dated: New York, N.Y.
March 11, 1977.

Respectfully submitted,

HAROLD J. RABY
UNITED STATES MAGISTRATE

cc: ✓ TUNICK & GREENBURG, ESQS.
60 East 42nd Street
New York, New York, 10017
Att: Carl Tunick, Esq.

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.
30 Rockefeller Plaza
New York, New York
Att: John Linville, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 57

WILLIAM J. SOLLOWAY,

PLAINTIFF,

against

THE FIRST INDIANA CORPORATION, CAN-WEST 1972 GAS PARTNERSHIP, a limited partnership, and CAN-WEST 1973 GAS PARTNERSHIP, a limited partnership,

DEFENDANTS.

NOTICE OF OBJECTIONS TO REPORT OF UNITED STATES MAGISTRATE

74 Civ 5090 PLW

S I R S :

PLEASE TAKE NOTICE that the Plaintiff, by his attorneys, Tunick & Greenburg, hereby files objection to the Report of Magistrate Harold J. Raby, dated March 11, 1977 and received by the attorneys for Plaintiff on March 14, 1977.

PLEASE TAKE FURTHER NOTICE that pursuant to 28 USC Sec. 636 Plaintiff requests that Judge Ward make a de novo determination of those parts that Plaintiff, in the annexed Affidavit, objects to.

Dated: New York, New York
March 22, 1977

Yours, etc.

Tunick & Greenburg
60 East 42nd Street
New York, New York 10017
(212) 867-7075

To: John Linville, Esq.
DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.
30 Rockefeller Plaza
New York, New York

30

A 58

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. SOLLOWAY :

Plaintiff : AFFIDAVIT

-against- : 74 Civ 5096 RJW

THE FIRST INDIANA CORPORATION, :
CAN-WEST 1972 GAS PARTNERSHIP, :
a limited partnership, and :
CAN-WEST 1973 GAS PARTNERSHIP, :
a limited partnership :

Defendants :

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

WILLIAM J. SOLLOWAY, being duly sworn, deposes and says:

I am the Plaintiff in the action, and I make this Affidavit to indicate my objections to the findings and recommendations of the Report of Magistrate Raby of March 11, 1977. I object to the following findings of Magistrate Raby:

Magistrate Raby's findings are found at pages 69 through 73 of the transcript. I object because Magistrate Raby made mistakes of both Law and Fact.

Specifically, I object to the finding at page 70 where he ruled

I am constrained to hold and to find that the mere fact that the defendant was late in supplying the information needed to supply a financial statement would be no justification for the opening up of the settlement in this case.

I further object to the finding at page 70 that there was no reliance, and the finding, at page 72,

> Given these circumstances, I am led to the inescapable inference that he did what he did with his eyes wide open and that under the circumstances he should not be able, not be permitted to unsettle this judgment.

I further object to each and every finding of law and fact and also to the whole determination thereof.

I was advised that this matter could be placed back on the calendar if

1. satisfactory security arrangements could not be made to insure performance of a settlement; or

2. if current financial statements of all the defendants (which were to be produced within two weeks after April 8, 1976) did not support the representations made by the defendants at the conference, or

3. if the information ordered from the defendant was not forthcoming.

In fact, the financial information of the three defendants including the Oil and Gas Engineering Reports were not produced by the defendants until the week of September 1976 and the Partnership financials until March 1977 and then only in part and not complete and these documents were rendered only after the defendants had been twice served with Notices to Produce. On this basis alone, this matter should be returned to the calendar so that I may have my day in Court.

I respectfully suggest that Magistrate Raby erred in his findings when he said (page 36) "you can, of course, have a settlement without having any financial information." as it is clearly stated and

inferred in the settlement that financials had to be supplied by the defendants or this matter was to be returned to the calendar.

It is further suggested that Magistrate Raby erred when he said (page 38) " but as far as asking for financial information for the purposes of an ad hoc justification of a settlement, I do not think that that impresses me too much " as the financials of the defendants was essential to support the confiscatory award to the defendants of my 2500 shares of common stock for which the defendants had previously offered in writing $35,000. (letter from FINCAP of May 2, 1974).

Judge Raby confused me and misled me in his examination when he asked me about the financials of FINCAP and then asked whether I believed Dr. Haeberle, (P.19) I truthfully said that I did not believe Dr. Haeberle as the documents produced subsequent to the settlement prove that he was lying. Then I was asked if I had believed him then and when I started to answer "No but without financials I had no alternative but to believe him," I was cut off from a full answer by Magistrate Raby who stated that I could now not claim reliance on Dr. Haeberle's statement. In his finding , Magistrate Raby fails to take into consideration subsequent testimony given at the hearing that supports my contention that I was misled and am the victim of misrepresentation.

The facts are very clear that the defendants did not conform to page 6 of Judge Ward's decision which required the defendants to furnish within two weeks from April 8th.,1976 financial statements of the three defendants nor was there supplied a statement by Dr. Haeberle that they were "true and correct on the basis of whatever knowledge

Dr. Haeberle has:

The financials subsequently produced by the defendants in December, 1976 show FINCAP'S and the Partnership's unearned cashflow (all without earning any monies from present activities) to be:

1976	:	$ 53,118.
1977	:	$ 123,235.
1978	:	$ 1,066,798.
Thereafter	:	$ 1,694,887.

Dr. Haeberle pleaded with Judge Ward that a five year payout was absolutely necessary to pay $ 30,000 and they could only afford to pay $ 5,000 at the conclusion of the settlement. Judge Ward allowed the defendants five years but this payout period was permitted subject to the financials being produced to support Dr. Haeberle's contention. The financials now refute Dr. Haeberle's pleading and a serious misrepresentation against the Court can now be proven.

I, therefore, respectfully submit that Magistrate Raby erred in his findings; that misrepresentation and mistake occurred in the settlement negotiations; and I urge that this claim be restored to the Trial Calendar.

William J. Solloway

WILLIAM J. SOLLOWAY

Dated: March 22, 1977
New York, New York

Sworn to before me this

22 day of March, 1977.

HENRY A. GREENBERG
New York
County
Certificate Filed in New York County

A 62

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WILLIAM J. SOLLOWAY,

Plaintiff,

-against-

74 Civ. 5096
R.J.W.

THE FIRST INDIANA CORPORATION,
CAN-WEST 1972 GAS PARTNERSHIP,
a limited partnership, and
CAN-WEST 1973 GAS PARTNERSHIP,
a limited partnership,

Defendants.

----------x

Plaintiff, pursuant to 28 U.S.C. §636, objects to and seeks de novo review of the Report of the Honorable Harold J. Raby, United States Magistrate, dated March 11, 1977 recommending denial of his motion to reopen and restore this case to the trial calendar following its settlement and dismissal. For the reasons hereinafter stated, and after a de novo review of the entire record, the Court overrules the objections, adopts the recommendations of the Magistrate, and confirms his Report.

A settlement agreement in this case was arrived at on April 8, 1976. On September 1, 1976 plaintiff duly filed a motion to set aside the settlement and dismissal, based on alleged fraud in the inducement and defendants'

alleged failure to timely furnish adequate financial information upon which to frame an adequate security agreement as provided for in the settlement.

In a memorandum decision dated October 14, 1976, this Court set forth the pertinent provisions of the settlement agreement, set out the applicable law, and referred two factual issues to Magistrate Raby as follows:

> (1) Whether defendants made misrepresentations of their financial position, causing plaintiff to rely thereupon, to his detriment, by agreeing to the provisions of the settlement; and
> (2) Whether the parties have made a good faith effort to arrive at a satisfactory security arrangement.

After a period of discovery relating to these issues, Magistrate Raby held an evidentiary hearing on February 9, 1977 at which plaintiff testified. At the conclusion of plaintiff's evidence, Magistrate Raby found that plaintiff had failed to make out a prima facie case on either of his allegations.

As to his first allegation, fraud in the inducement, the Magistrate found that plaintiff had failed to establish reliance on defendants' alleged misrepresentations.

As to the second allegation, that defendants The First Indiana Corporation ("Fincap"), Can-West 1972 Gas Partnership and Can-West 1973 Gas Partnership had been late in supplying certain financial information in connection

with plaintiff's undertaking to draft a proposal to secure the settlement payments, Magistrate Raby found that since plaintiff admitted that he now had the information he felt that he needed to draft the security agreement, there was no need for further inquiry concerning the extent of and timeliness of defendants' production, and no reason to reopen the settlement.

In order to prove fraud plaintiff must establish that defendants made a representation which was material and false or misleading when made, was known by defendants to be false or misleading when made, was made with the intention of or knowledge that plaintiff would rely thereon, and was justifiably relied on by plaintiff to his detriment. Clarion Corp. v. American Home Products Corp., 494 F.2d 860, 865 (7th Cir.), cert. denied, 419 U.S. 870 (1974); McCarthy v. Cahill, 249 F. Supp. 194, 196 (D.D.C. 1966).

The heart of plaintiff's fraud claim is that Fincap's President, Dr. Haeberle, and its attorney, Mr. Linville, represented to him that the financial condition of Fincap was so precarious that it could not afford to pay the agreed settlement of $30,000 in a lump sum, and would go bankrupt if plaintiff prevailed in his lawsuit and obtained the damage award he was seeking. Plaintiff claims that the financials which were produced by defendants demonstrate that the above representations were false.

Plaintiff also claims that he was misled as to paragraph 3 of the settlement which provided that upon completion of payment of the outstanding balance of the settlement sum he would surrender to Fincap his 2500 Fincap shares for which he had paid $1.00 a share. In addition, he claims that Dr. Haeberle allegedly told him that the stock was worth less than $2.00 per share, that he believed and relied upon Dr. Haeberle's representation, but he now knows that representation was false because he himself has "appraised Fincap stock to have a cash flow in excess of $15.00 a share."

With respect to these fraud in the inducement allegations the Court finds, first, that plaintiff has not met his burden of proving that Fincap's financial condition was not precarious in April 1976. Specifically, plaintiff offered no credible evidence that Fincap's financial condition in April 1976 would have permitted it to pay the $30,000 settlement at that time. In fact, plaintiff conceded that Fincap's most recent audited financial statement, which was marked at the hearing as Exhibit 3, showed that Fincap had a negative net worth of about $121,000. That same financial statement shows that as of January 31, 1976 Fincap had current assets of approximately $15,000 and current liabilities of approximately twice that amount.[1] Moreover, plaintiff

testified:

> [w]e made a settlement with no warranties or prejudices on the defendant's side as to what the status of the company was.

Therefore, the Court cannot find that there was a material misrepresentation concerning defendants' inability to make a lump sum payment of $30,000 in April 1976, or for that matter, its apparent unwillingness to agree to a larger overall settlement figure.

Second, assuming arguendo that there were material misrepresentations as to Fincap's financial condition, the Court finds that plaintiff has not met his burden of proving by clear and convincing evidence that he justifiably relied on them. This finding is based upon the following portions of the transcript of the hearing before Magistrate Raby:

> Q Did you ask whether or not there were financials after the financials of '73?
>
> A Yes, of course. I wanted to see financials.
>
> * * *
>
> Q Of whom did you ask for these financials?
>
> A Dr. Haeberle.
>
> Q When did you ask for them the last time?
>
> A Asked him first thing at the trial or before the trial of April the 8th.
>
> Q What did he say to you?
>
> A "We don't have them."
>
> Q "We don't have them here today"?

A They said, "We don't have them."

Q Were you told whether they existed or whether they were just not there in the court that day?

A I believe he said that they didn't have them, period. The inference being that they didn't exist.

MAGISTRATE RABY: That is your inference?

Q Right.
Were you ever told they didn't exist?

A I believe he said that since the company hasn't any money we haven't made financials.

MAGISTRATE RABY: Did you believe Dr. Haeberle, had he told you that the stock of the company was worth less than $2.00 a share?

THE WITNESS: I don't believe Dr. Haeberle.

MAGISTRATE RABY: Did you believe him then?

THE WITNESS: No.

MAGISTRATE RABY: Then you can hardly claim reliance on that statement.

THE WITNESS: Let me explain my answer. I don't believe him when he said one, he didn't have financials, because FINCAP is a financial company.

It's obvious an enterprise is running financial partnerships, and it is absolutely impossible to act and carry on their business without continually having financial information. They are the general partner of two partnerships.

MAGISTRATE RABY: The more you say, the deeper you get, sir, because you are disclaiming any reliance on those people and if you are not able to establish reliance, you are out of court.

* * *

MAGISTRATE RABY: Would you refresh my recollection, Mr. Solloway, did you not tell this court a little while ago when Dr. Haeberle had said that the stock was worth less than $2.00 a share you didn't believe him, is that not your testimony, was that not your testimony?

THE WITNESS: Yes, but it was a bad choice, it was a bad phrase. What I mean by that is when I requested the financial information and Haeberle said, "Look, I don't have, we don't have it. We are broke. We haven't made up financial information. We don't have financial information," I knew he was not speaking the truth because he is running partnerships. He is receiving checks every month from the gas fields. He has to have financial information.

That is what I meant to say when he said he doesn't have any financials. I didn't believe him.

MAGISTRATE RABY: In other words, you didn't trust Dr. Haeberle; is that correct?

THE WITNESS: When he said he had no financial information.

* * * *

THE WITNESS: What infuriated me was that he was not telling me the truth and not coming before the court and telling that.

MAGISTRATE RABY: If you were so infuriated and if, as you say, you did not trust the man, how did it happen that you were willing to enter into a settlement agreement without insisting in advance that you get written financial information?

On the basis of the above-quoted testimony of plaintiff, the Court independently concludes that if plaintiff believed that Dr. Haeberle was lying to him about the existence of financials, then this should have put him on notice

that he could not justifiably rely on Dr. Haeberle's cooperation and trustworthiness in proposing settlement terms. As this Court stated in its October 14, 1976 memorandum decision, plaintiff "must . . . show that he had the right to rely upon those statements without any further investigation of defendants' current financial status. McCarthy v. Cahill, 294 F. Supp. 194 (D.D.C. 1966)." Solloway v. The First Indiana Corp., et al., 74 Civ. 5096 (S.D.N.Y. Oct. 14, 1976) at 5. Plaintiff has failed to make the requisite showing.

Plaintiff appears to proffer two excuses for his failure to act upon his apparent distrust of Dr. Haeberle and investigate defendants' financial status before consummating the settlement. The first excuse is gleaned from plaintiff's testimony before Magistrate Raby that "it is always incumbent in all of the negotiations that I was privy to with Judge Ward that the financials would have to be produced." Contrary to plaintiff's assertion, it is not the Court's practice to require a defendant to produce financials either before or after the stipulation of settlement and dismissal so that a plaintiff can determine whether he is making or has made a wise settlement. If prudence dictates such production of financials, it is incumbent upon plaintiff to negotiate a provision for it.

This leads to what appears to be plaintiff's second excuse, which is gleaned from his testimony that "[y]ou can't make settlements without financials and the fact that the wording happened to be omitted at the last second, at the end of a very long day, is incomprehensible to me." Of course settlements can be made without financials, as Magistrate Raby found. In fact, that is what happened in this case, for the furnishing of financials clearly was intended solely for the purpose of facilitating the preparation of a security agreement, not for the purpose of making an ex poste facto evaluation of the wisdom of the settlement. If the latter is what plaintiff had in mind, then he should have made the settlement expressly contingent upon the production of financials that would substantiate the proffered settlement. "[T]he fact that the wording happened to be omitted at the last second" is unfortunate for plaintiff. The Court will not compensate for plaintiff's lack of foresight by re-writing the parties' agreement concerning the production of financials.

As to the alleged misrepresentations concerning the value of Fincap's stock, the Court will assume arguendo that Dr. Haeberle did represent that Fincap's stock was worth less than $2.00 a share. Nonetheless, the Court finds first, that plaintiff did not meet his burden of proving by clear and convincing evidence that this representation was

false. Plaintiff has cited no authority for the proposition that the "cash flow" method by which he determined that the stock was worth $15 a share is the appropriate method by which to value the stock; nor has plaintiff demonstrated that he is qualified to testify as an expert on this subject. Accordingly, plaintiff has failed to persuade the Court that his opinion concerning the value of Fincap's stock is any more correct than Dr. Haeberle's opinion, or so-called representation.

Second, the Court finds that even if there was a material misrepresentation as to the value of Fincap's stock, a reasonable man would not have relied upon such an unsupported opinion regarding a highly technical subject, particularly since Dr. Haeberle was plaintiff's adversary, and plaintiff testified that he believed Dr. Haeberle had lied as to other material matters.

The Court now turns to whether defendants breached their undertaking to produce financials and thereby frustrated the preparation of a security agreement, which would entitle plaintiff to vacate the settlement and put the case back on the trial calendar.

In paragraph 4 of the stipulation of settlement, the parties agreed that a security agreement would be prepared for the benefit of plaintiff. Paragraph 7 provided

that, "[i]n working out the security agreement . . . defendants have agreed to furnish financial statements of the three defendants . . . [a]nd that such statements will be furnished within two weeks from the date hereof. . . ." Paragraph 5 provided that in the event of disagreement over the security agreement, the case would be put back on the trial calendar, as plaintiff now seeks to do. The question, then, is whether there is a bona fide dispute over the security agreement, for as this Court stated in its October 14, 1976 memorandum decision, plaintiff "can not now unilaterally repudiate the settlement because he is no longer satisfied with the agreement." Solloway, supra at 6. Thus, the second issue before the Magistrate was whether the parties had made a good faith effort to arrive at an agreement to provide collateral for Fincap's settlement agreement payments.

It is undisputed that defendants did not produce all the necessary financials within two weeks after April 8, 1976.[2] This is plaintiff's explanation of why he never prepared any proposal for a security agreement, nor discussed any such proposal with defendants after the settlement was consummated in Court on April 8, 1976, although it was incumbent upon him to take the initiative in this matter. It

is unnecessary for this Court to pass on the sufficiency of plaintiff's explanation, for he conceded at the hearing before Magistrate Raby that as of three weeks prior to that hearing he had received everything he needed to draft the security agreement. Consequently, this Court agrees with Magistrate Raby that defendants' tardiness in producing these materials is academic, since "the mere fact that the defendant was late in supplying the information . . . would be no justification for the opening up of the settlement in this case" when there has been no indication that the parties cannot now prep satisfactory security agreement.[3]

Accordingly, p ntiff's objections to the Report of the Magistrate are overruled, the recommendations adopted and the Report confirmed. The parties are directed to consummate this long delayed settlement within thirty days of the date of this decision.

It is so ordered.

Dated: April 11, 1977

Robert D. Ward
U. S. D. J.

NOTES

1 In citing plaintiff's concession that Fincap currently has a negative net worth, the Court rejects plaintiff's contention that future income rather than current assets is relevant to the determination of whether plaintiff was misled. Future income may be relevant to the preparation of the security agreement. However, as to the alleged misrepresentations, plaintiff himself put current, not future, assets in issue by claiming that he had been misled as to defendants' ability as of April 8, 1976 to pay out immediately a sizeable cash settlement or satisfy in the near future a large judgment.

2 In May 1976 plaintiff received the Fincap Consolidated Balance Sheet for January 31, 1975 and January 31, 1976 (plaintiff's Exhibit 3), and engineering reports concerning oil and gas well leases assigned to defendants. (April 1, 1976 and revised August 1976 Reports of Rapelje and Medicine Hat Interests of Concept Resources Ltd., plaintiff's Exhibits 1 and 2). Plaintiff testified that he could not prepare a security agreement on the basis of these records because these records were dependent upon references to a "Schedule A" which plaintiff did not have. Plaintiff testified that he thereafter sought to obtain Schedule A from Dr. Haeberle and Mr. Linville on at least seven occasions. On cross-examination plaintiff admitted that Dr. Haeberle had told him that Schedule A was still incomplete, which is why they had not sent it to plaintiff. On September 9, 1976, plaintiff received various memoranda written to the partnerships as well as certified financials.

3 As Magistrate Raby found, presumably plaintiff's belief that he had been defrauded was also a factor in his apparent failure to take any steps toward completing the security agreement, other than repeatedly requesting a copy of Schedule A; and this belief is evidently the real reason for his apparent unwillingness to prepare the security agreement now that he has all the information he needs. Since the Court has found that plaintiff failed to prove fraud, he cannot simply turn his back

on his own obligation to make a good faith effort to arrive at a security agreement and thereby create a "dispute" requiring the case to be restored to the trial calendar.

A 76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. SOLLOWAY :

Plaintiff :

-against- :

THE FIRST INDIANA CORPORATION, :
CAN-WEST 1972 PARTNERSHIP,
a limited partnership and :
CAN-WEST 1973 GAS PARTNERSHIP,
a limited partnership :

Defendants :

FILED WITH DISTRICT COURT
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S.D. of N.Y.

74 Civ. 5096

R. J. W.

NOTICE OF APPEAL

Notice of hereby given that WILLIAM J. SOLLOWAY Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Hon. Justice Robert J. Ward, entered in this action on the Eleventh day of April, 1977.

Dated: New York, New York
May 6, 1977

William J. Solloway

WILLIAM J. SOLLOWAY, pro se
18 East 68th Street
New York, New York 10021
212/249-2836

TO:

Donovan, Leisure, Newton
& Irvine, Esqs.
30 Rockefeller Plaza
New York, New York
Attn: John Linville, Esq.

A 77

EVALUATION
OF
RAPELJE AND MEDICINE HAT INTERESTS
OF
CONCEPT RESOURCES LTD.

Prepared for:

CONCEPT RESOURCES LTD.

April 1, 1976

D&S PETROLEUM CONSULTANTS (1974) LTD.

CALGARY, Alberta. LONDON, England.

CONCEPT RESOURCES LTD.

	Proved	Probable Additional	Total
Remaining Reserves			
Natural Gas, MMcf			
Medicine Hat	7,692	0	7,692
Rapelje	6,164	1,469	7,633
Total	13,856	1,469	15,325
Future Cash Flow			
Undiscounted, $			
Medicine Hat	16,785,521	0	16,785,521
Rapelje	10,315,411	1,430,565	11,745,976
Total	27,100,932	1,430,565	28,531,497
Discounted @ 9%, $			
Medicine Hat	6,841,956	0	6,841,956
Rapelje	3,450,377	632,621	4,082,998
Total	10,292,333	632,621	10,924,954

	73 FUND			72 FUND
	Proved	Probable Additional	Total	Proved
Remaining Reserves				
Natural Gas, MMcf				
Medicine Hat	2,768	0	2,768	1,238
Rapelje	1,548	108	1,656	285
Total	4,316	108	4,424	1,523
Future Cash Flow				
Undiscounted, $				
Medicine Hat	6,039,316	0	6,039,316	2,700,590
Rapelje	1,668,082	54,755	1,722,837	415,413
Total	7,707,398	54,755	7,762,153	3,116,003
Discounted @ 9%, $				
Medicine Hat	2,461,689	0	2,461,689	1,100,789
Rapelje	571,520	21,285	592,805	157,664
Total	3,033,209	21,285	3,054,494	1,258,453

= $10,878,156.

Proved reserves are defined as those reserves which are considered to be recoverable to a high degree of certainty at commercial rates, assuming present depletion methods and recoveries, operating conditions, price forecasts and costs. Probable additional reserves are defined as those reserves which may be recovered from undrilled

.....Cont'd.

D&S

TABLE 4

72 FUND

TOTAL PROVED RESERVES

NATURAL GAS APPRAISAL SUMMARY

EVALUATION BY :- D.S PETROLEUM CONSULTANTS(1974)LTD. PROJECT :- 176-0041

COMPANY EVALUATED :- 72 FUND EFFECTIVE DATE :- APR 1,1976

YEAR	POOL OR TRACT SHARE GROSS PRODN MMCF	GAS PRICE $/MMCF	OPER. COSTS DOLLARS	CAPITAL COSTS DOLLARS	NO. WELLS	COMPANY SHARE ---PRODUCTION--- GROSS MMCF	NET MMCF	-------COSTS------ OPERATING DOLLARS	CAPITAL DOLLARS	-NET OPER. REVENUE- ANNUAL DOLLARS	CUM DOLLARS	----------CASH FLOW---------- UNDISC. DOLLARS	PW 9 % DOLLARS	CUM PW DOLLARS
1976	3378	969	209492	0	116	15	15	461	0	9462	9462	9462	9161	9161
1977	4580	1176	331320	0	124	18	18	676	0	14491	24152	14691	13190	22350
1978	4405	1437	376058	0	128	113	113	743	0	159980	184133	159980	131774	154125
1979	4105	1638	413675	0	128	121	121	818	0	196026	380159	196026	148133	302258
1980	3425	1705	430893	0	128	111	111	899	0	187600	567758	187600	130040	432318
1981	3565	1771	448966	0	128	102	102	989	0	179105	746863	179105	113918	546236
1982	3312	1848	461308	0	128	93	93	626	0	170793	917656	170793	99662	645898
1983	3074	1917	470862	0	126	85	85	0	0	161706	1079362	161706	86568	732466
1984	2866	1992	480496	0	126	78	78	0	0	154080	1233442	154080	75675	808141
1985	2672	2077	509284	0	126	71	71	0	0	147131	1380573	147131	66295	874436
1986	2491	2153	529655	0	126	65	65	0	0	139476	1520049	139476	57657	932093
1987	2323	2237	550841	0	126	60	60	0	0	132354	1652403	132354	50195	982289
1988	2166	2323	572475	0	126	54	54	0	0	125254	1777658	125254	43581	1025869
1989	2020	2416	595790	0	126	50	50	0	0	118492	1896149	118492	37823	1063693
1990	1884	2510	619622	0	126	45	45	0	0	111722	2007871	111722	32718	1096410
1991	1757	2595	644407	0	126	41	41	0	0	104480	2112352	104480	28071	1124481
1992	1639	2593	644407	0	126	37	37	0	0	94737	2207088	94737	23351	1147833
1993	1529	2591	644407	0	126	34	34	0	0	85597	2292685	85597	19356	1167189
1994	1426	2589	644407	0	126	29	29	0	0	72629	2365314	72629	15058	1182257
1995	1330	2587	644407	0	126	25	25	0	0	63925	2429239	63925	12167	1194424
1996	1241	2585	644407	0	126	23	23	0	0	57288	2486527	57288	10003	1204427
1997	1158	2582	644407	0	126	21	21	0	0	51105	2537631	51105	8187	1212614
1998	1080	2580	644407	0	126	18	18	0	0	45343	2582975	45343	6664	1219278
1999	1008	2578	644407	0	126	16	16	0	0	39975	2622950	39975	5390	1224669
2000	940	2575	644407	0	126	14	14	0	0	34973	2657923	34973	4326	1228995
2001	878	2573	644407	0	126	13	13	0	0	30312	2688235	30312	3440	1232435
SUBTOT	60652		14099117	0		1353	1353	5212	0	2688235		2688235	1232435	
REMAIN	13122		10428867	0		170	170	0	0	427767		427767	26018	
TOTAL	73774		24527984	0		1523	1523	5212	0	3116003		3116003	1258453	

DISCOUNT RATE PERCENT	PRESENT WORTH CASH FLOW	PRESENT WORTH NET REVENUE	DISCOUNTED CAP COSTS
.000	3116003	3116003	0
9.000	1258453	1258453	0
12.000	1017574	1017574	0
15.000	844445	844445	0
20.000	645633	645633	0
25.000	513192	513192	0
7.000	1477256	1477256	0

Note: 72 Fund has recovered $23,854 to April 1, 1976. Therefore, there is $34,907 and $152,428 to recover to interest changes in Fund. Concept does not share in 72 Fund until October 23, 1979, when 73 Fund pays out.

A 79

TABLE 7

73 FUND

TOTAL PROVED RESERVES

NATURAL GAS APPRAISAL SUMMARY

EVALUATION BY :- D&S PETROLEUM CONSULTANTS(1974) LTD. PROJECT :- 176-0041

COMPANY EVALUATED :- 73 FUND EFFECTIVE DATE :- APR 1,1976

YEAR	POOL OR TRACT SHARE GROSS PRODN MMCF	GAS PRICE $/MMCF	OPER. COSTS DOLLARS	CAPITAL COSTS DOLLARS	NO. WELLS	COMPANY SHARE PRODUCTION GROSS MMCF	NET MMCF	COSTS OPERATING DOLLARS	CAPITAL DOLLARS	NET OPER. REVENUE ANNUAL DOLLARS	CUM. DOLLARS	CASH FLOW UNDISC. DOLLARS	PW 9 % DOLLARS	CUM PW DOLLARS
1976	3591	953	241420	0	125	66	66	4192	0	41021	41021	41021	39715	39715
1977	4683	1169	375260	0	134	90	90	7028	0	68663	109684	68663	61647	101362
1978	6352	1462	461506	0	137	285	285	8225	0	383061	492745	383061	315524	416887
1979	4054	1644	403947	0	137	300	300	9090	0	465366	958611	465366	352046	768933
1980	3777	1711	482546	0	137	278	278	9811	0	447138	1405749	447138	309994	1078927
1981	3519	1774	501548	0	137	257	257	10123	0	427469	1833218	427469	271899	1350815
1982	3268	1855	516576	0	137	237	237	10770	0	410053	2243271	410053	239276	1590090
1983	3033	1934	529719	0	135	220	220	11554	0	390760	2634031	390760	209190	1799281
1984	2927	1939	550908	0	135	202	202	12016	0	372387	3006418	372387	182895	1982175
1985	2635	2085	573944	0	135	187	187	12497	0	356227	3362645	356227	160511	2142687
1986	2456	2162	595462	0	135	172	172	12997	0	338162	3700806	338162	139790	2282477
1987	2289	2247	619697	0	135	159	159	13517	0	321216	4022022	321216	121821	2404298
1988	2121	2337	642456	0	135	144	144	13837	0	302294	4324316	302294	105179	2509477
1989	1915	2454	656828	0	134	125	125	13157	0	275590	4599906	275590	87970	2597448
1990	1769	2557	679863	0	133	112	112	13331	0	257030	4856936	257030	75272	2672719
1991	1635	2651	701565	0	133	101	101	13314	0	238204	5095140	238204	63998	2736718
1992	1514	2654	698107	0	132	91	91	12967	0	214364	5309504	214364	52838	2789556
1993	1410	2653	698107	0	132	83	83	12967	0	193150	5502654	193150	43678	2833234
1994	1314	2651	698107	0	132	72	72	12967	0	163416	5666070	163416	33903	2867136
1995	1223	2650	698107	0	132	64	6	12967	0	143252	5809323	143252	27266	2894402
1996	1139	2649	698107	0	132	58	58	12967	0	127747	5937070	127747	22307	2916709
1997	1061	2648	698107	0	132	52	52	12967	0	113289	6050359	113289	18149	2934858
1998	989	2647	698107	0	132	47	47	12967	0	99807	6150166	99807	14669	2949527
1999	921	2645	698107	0	132	42	42	12967	0	87234	6237400	87234	11762	2961289
2000	858	2644	698107	0	132	38	38	12967	0	75508	6312907	75508	9341	2970630
2001	799	2643	698107	0	132	33	33	12967	0	64571	6377479	64571	7328	2977958
SUBTOT	59142		15534355	0		3515	3515	305132	0	6377479		6377479	2977958	
REMAIN	13585		12008157	0		801	801	410360	0	1329919		1329919	55252	
TOTAL	72727		27542512	0		4316	4316	715491	0	7707398		7707398	3033209	

DISCOUNT RATE PERCENT	PRESENT WORTH CASH FLOW	PRESENT WORTH NET REVENUE	DISCOUNTED CAP COSTS
.000	7707398	7707398	0
9.000	3033209	3033209	0
12.000	2466363	2466363	0
15.000	2057384	2057384	0
20.000	1584961	1584961	0
25.000	1268346	1268346	0
7.000	3548397	3548397	0

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Note: Payout October 23, 1979. See 73 Fund writeup for calculation.

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